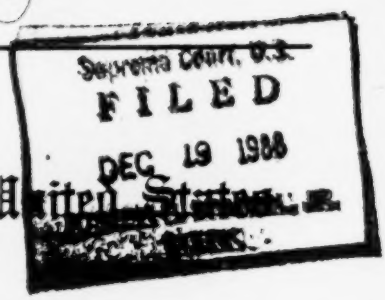
No. 88-706



In The

Supreme Court of the United States

October Term, 1988

POLICEMEN'S BENEVOLENT ASSOCIATION OF NEW JERSEY, LOCAL 318 AND EDMUND GIORDANO, individually and as President of Local 318,

Petitioners,

vs.

TOWNSHIP OF WASHINGTON and JOHN ROBERTSON, Mayor,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE, NEW JERSEY STATE PATROLMEN'S BENEVOLENT ASSOCIATION

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TABLE OF CONTENTS

Page

Interest of Amicus Curiae 2

Parties 3

Statement of the Case 4

A. Facts 4

B. District Court Decision 5

C. Court of Appeals Decision 6

D. Proceedings Before This Court 6

Summary of Argument 7

Argument:

The intrusive and demeaning searches of police officers through random urinalysis, without a warrant, probable cause or any reasonable or individualized suspicion, is a violation of the Fourth and Fourteenth Amendments. 8

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Camara v. Municipal Court, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967) 9, 14

Contents

Page

Connick v. Myers, 461 U.S. 138, 183 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) 12

Fraternal Order of Police v. Newark, 524 A.2d 430 (N.J. App. Div. 1987) 13

Garrity v. New Jersey, 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1987) 12

Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987) 9

Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) 8

Lovelorn v. City of Chatanooga, 846 F.2d 1539 (6th Cir. 1988) 13

Marshall v. Barlow's Inc., 436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978) 10, 14

McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1988) 9

New Jersey v. T.L.O., 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985) 8, 9, 15

New York v. Burger, ____ U.S. ____, 96 L. Ed. 2d 601, 107 S. Ct. 2636 (1987) 9, 10, 14

O'Connor v. Ortega, ____ U.S. ____, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987) 8, 9, 12, 13, 15

Penny v. Kennedy, 846 F.2d 1564 (6th Cir. 1988) 13

Contents

Page

Capua v. City of Plainfield, 843 F. Supp. 1507 (D. N.J. 1986) 13

Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966) 8, 9

Shoemaker v. Handel, 795 F.2d 1135 (3rd Cir.), cert. denied, 107 S. Ct. 577 (1986) 6, 8, 13

United States Constitution Cited:

Fourth Amendment 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16

Fifth Amendment 12

Fourteenth Amendment 8

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE, NEW JERSEY STATE PATROLMEN'S BENEVOLENT ASSOCIATION

INTEREST OF AMICUS CURIAE

The New Jersey State Patrolmen's Benevolent Association (hereinafter "State PBA") is the primary fraternal and collective bargaining organization for law enforcement officers in the State of New Jersey. In its role as an economic organization, it constitutes the parent body of local PBAs which serve as collective bargaining representatives for the vast majority of police officers in New Jersey. In its fraternal capacity, the State PBA also functions as a lobbying and professional organization to protect and advance the interests of police officers throughout the State of New Jersey. Simply stated, the State PBA is the predominant professional and economic representative for police officers in New Jersey, and its goal and purpose is to serve their professional and economic interest. In this regard, it is important to note that the State PBA is the parent organization for the Washington Township PBA Local 315, the petitioner in this case.

As part of this process, and throughout its history, the State PBA has involved itself in, and taken positions on, legal matters and judicial proceedings which are of fundamental importance to police officers in this state. This has included both funding local associational actions, as well as direct participation in pending court proceedings. In numerous cases the State PBA has presented to the judiciary its position on various legal issues of import or concern to police officers or the law enforcement community. Often this involvement has been in the form of appearing as an *amicus curiae*. The State PBA wishes to continue to assist this Court in the presentation of the views of police officers, and has submitted to the Clerk of the Court, simultaneous with the filing of this brief, letters of consent by the parties to this action consenting to the appearance of the State PBA as an *amicus curiae*.

The concern of the State PBA in this case is self-evident from a reading of the decision of the Third Circuit Court of Appeals

at issue. As will be indicated more fully, the decision of the Third Circuit, if permitted to stand, authorizes random or periodic "drug testing" of police officers in this state without a warrant and without either probable cause, reasonable suspicion, or any other individualized facts justifying a belief that an officer is using, or is under the influence of, controlled substances. Obviously, as the group which is directly affected by the decision of the Third Circuit Court of Appeals, police officers and the State PBA have a substantial interest in the constitutionality of the regulations of Washington Township, which permit drug testing in the unfettered discretion of the Chief of Police or executive officials of the Township.

For these reasons, the State PBA respectfully submits this brief as an *amicus curiae* in this case. This brief is submitted in support of the position of the petitioners Washington Township PBA Local 315 and Edmund Giordano and in opposition to the decision of the Court of Appeals holding the regulatory scheme for drug testing of police officers to be constitutional.

PARTIES

Petitioners in this case are the Policemen's Benevolent Association of New Jersey Local 318 and Edmund Giordano, the President of that organization. PBA Local 318 is the collective bargaining representative of all police officers employed in the Township of Washington.

Respondents are the Township of Washington, a municipal corporation, and John Robertson, the mayor of the municipality. The New Jersey State Patrolmen's Benevolent Association ("State PBA") submits this brief as an *amicus curiae* in support of petitioners.

STATEMENT OF THE CASE

A. Facts

The facts of this case are not seriously disputed. Petitioners are the president and the collective bargaining representative for all police officers employed in respondent Washington Township, New Jersey. The respondents are the Township of Washington, a suburban community in southern New Jersey, and its mayor (5a to 6a).[1] On August 5, 1986, Mayor Robertson sent a memorandum to all department heads, including the Police Department, announcing that the Township would begin a mandatory drug testing program (1a-2a). While there was no articulable claim of drug use or drug abuse among any Township employees, and particularly among police officers, the memorandum indicated that the mere fact that drug abuse is a statistically significant problem in the United States was sufficient to justify a program of random drug testing. The announcement contained no guidelines or procedures as to how the testing program would be conducted.

On September 12, 1986, the petitioners filed suit in the United States District Court for the District of New Jersey on behalf of Township police officers to obtain injunctive relief. Upon representation by the Township that no drug testing would take place until guidelines were developed, however, injunctive relief was denied and the matter proceeded to discovery (7a).

On February 25, 1987, the Township prepared and submitted a "revised drug testing program of the Township of Washington", which contained the guidelines contested in this suit. The program provides that no individualized suspicion is required before an individual might be required to submit a urine sample for analysis.

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1. ___a refers to appendix of petitioners.

Police officers who are selected randomly under the program will be ordered to urinate in the presence of a government monitor for purposes of analysis of the specimen for the presence of illegal drugs. Prior to the test, an employee must fill out a medical questionnaire listing all drugs, both prescription and non-prescription, which were ingested during the past 30 days. Testing will be performed by a professional laboratory, and any employee testing positive for the presence of any illegal substance is subject to immediate discipline and discharge (9a-18a).

The guidelines also require that every current employee, including all police officers, must submit to an annual urinalysis drug test as part of an annual physical. Neither medical examinations nor fitness for duty tests have ever previously been imposed by the Township. The sole reason for this annual medical examination is to conduct an annual test for drugs, in addition to the random testing which will take place during the calendar year (11a).

B. District Court Decision

Following discovery, the parties made cross-motions for summary judgment before the District Court. In a comprehensive opinion, the District Court held that random drug testing of the Township police officers, in the absence of any reasonable or individualized suspicion to believe drug use had occurred, is a violation of the constitutional rights of those officers (3a-89a). Concluding that urinalysis for purposes of detecting drugs is a "search" within the meaning of the Fourth Amendment, the court concluded that such intrusions into intimate bodily functions, without some individualized suspicion, violated applicable constitutional procedures. The court further concluded that in the absence of any showing of a drug problem among the police force of Washington Township, there was absolutely no basis for subjecting an entirely blameless group of employees to the intrusive and demeaning procedures implicated by government sponsored

urinalysis drug testing (83a). The court accordingly enjoined any implementation of the contested guidelines (87a-88a).

C. Court of Appeals Decision

On appeal, the Third Circuit reversed, concluding that an administrative search exception to the Fourth Amendment exists in certain highly regulated industries, that the Washington Township Police Department is such an "industry", and this conclusion alone justifies complete disregard of both warrant requirements of any form of reasonable individualized suspicion, relying upon *Shoemaker v. Handel,* 795 F.2d 1135 (3rd Cir.), *cert. denied,* 107 S. Ct. 577 (1986) (90a-117a). In *Shoemaker,* the Third Circuit concluded that horse racing is a "highly regulated industry" intensely scrutinized by the public, and that jockeys have a greatly diminished expectation of privacy, diluting the constitutional protection embodied by the Fourth Amendment. Extrapolating these principles and applying them to New Jersey police officers in light of the extensive body of state statutory and regulatory controls which govern them, the court concluded that police work also constitutes a "highly regulated industry" which provides sufficient justification for dispensing with both the warrant requirements of the Fourth Amendment, and any reasonable or individualized suspicion of wrongdoing, before such a highly intrusive search of bodily waste products may be conducted by the state. The Court of Appeals thereafter denied a request for rehearing *en banc* (118a-119a).

D. Proceedings Before This Court

Petitioners thereafter filed their brief and petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. Respondents' brief in opposition, together with any application by *amicus* such as those stated herein, are due, by extension of this Court, on December 19, 1988.

SUMMARY OF ARGUMENT

This case turns on the question of whether Washington Township may randomly test members of its police force for drugs, through mandatory production of urinalysis which is analyzed for the presence of controlled substances, or through mandatory annual physicals required for the same purpose, where there is concededly absolutely no reason to believe that either the members of the Police Department generally, or any individual officer, have either abused or even used illegal drugs. In order to affirm the decision of the Court of Appeals, this Court must conclude that neither a warrant issued by a magistrate, nor even any individual suspicion based upon objective facts, is required before a most intrusive and humiliating government-sponsored program for searching its employees may be implemented.

Amicus New Jersey State PBA, on behalf of over 20,000 active and retired law enforcement officers in this state, contends, as did the District Court, that wholesale abolition of the warrant and/or reasonable suspicion requirement in searching police officers for possible drug use is an impermissible infringement upon Fourth Amendment rights which police officers enjoy. This is particularly true, moreover, in light of the complete absence of any claim that there is a drug abuse problem in the Police Department, or that if there were that it could not be ferreted out by more traditional means which respect basic Fourth Amendment principles. Complete abolition of the protection of the Fourth Amendment, as is effectively the result of the Court of Appeals' decision, constitutes a dangerous and ominous precedent for all public employees generally.

Amicus New Jersey State PBA also contends that an equally distressing aspect of the Third Circuit decision is its conclusion that police officers constitute so highly regulated an industry that constitutional protections against unreasonable searches and

seizures are simply inapplicable to them. In addition to being incorrect factually, the "highly regulated industry" exception carved out by *Shoemaker*, and radically extended by the court below, will ultimately swallow the general rule against unreasonable searches. If the reasoning of the Court of Appeals is accepted, hundreds of thousands of employees in industries which are regulated either by administrative agencies, or state or federal statute, will be drawn within the ambit of random testing for no other reason than the nature of their employment. The serious constitutional questions implicated by such a conclusion warrant review of the decision of the court below.

ARGUMENT

THE INTRUSIVE AND DEMEANING SEARCHES OF POLICE OFFICERS THROUGH RANDOM URINALYSIS, WITHOUT A WARRANT, PROBABLE CAUSE OR ANY REASONABLE OR INDIVIDUALIZED SUSPICION, IS A VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

Throughout the history of the United States, the overriding goal of the prohibition against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution has been to provide protection to citizens from arbitrary conduct. *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966). As a general rule, this protection is embodied by the requirement that a search warrant be issued by a neutral magistrate before legitimate expectations of privacy may be invaded. *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967); *New Jersey v. TLO*, 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985); *O'Connor v. Ortega*, ____ U.S. ____, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987). Repeatedly this Court has rejected efforts to expand the scope of permissible searches without a warrant, except in instances in

which no other practical alternative exists. Even in those circumstances, moreover, some showing must be made that an articulable, individualized suspicion of wrongdoing is present and sufficient to override protection to a legitimate zone of privacy. *New Jersey v. T.L.O., supra.*

Indeed, this Court has zealously guarded from erosion these protections of the Fourth Amendment even where expediency might otherwise counsel relaxation of the guiding constitutional principles. *Camara v. Municipal Court,* 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967); *O'Connor v. Ortega, supra.* While application of these fundamental requirements of the Fourth Amendment may differ in particular circumstances, this Court has never wavered in affirming the constitutional polestar of "reasonableness" before a search may be conducted.

The decision of the Court of Appeals below, however, constitutes a radical departure from these settled principles, and a dangerous extension of the extremely limited circumstances in which this Court has authorized governmental searches where objective indicia of wrongdoing is lacking. *See New York v. Burger,* ____ U.S. ____, 96 L. Ed. 2d 601, 107 S. Ct. 2636 (1987). Merely because of an individual's service and *status* as a police officer, the court concluded that intrusive, demeaning, arbitrary and constitutionally suspect invasions of privacy are acceptable. *Amicus* submits that the decision of the Court of Appeals, if left undisturbed, significantly erodes the protections historically afforded by the Fourth Amendment.

The court below does not dispute that compulsory urinalysis for analysis for the presence of drugs is a "search" under this Court's precedent. *Schmerber v. California, supra; McDonnell v. Hunter,* 809 F.2d 1302 (8th Cir. 1988); *Jones v. McKenzie,* 833 F.2d 335 (D.C. Cir. 1987). Nor is there any intimation by the court (indeed, Washington Township does not even allege) that there is any reason to believe that a drug problem exists within

the police force which might trigger the need for extraordinary measures to ferret out possible substance abusers. Instead, the court suggests that this search simply stands outside the ambit of traditional Fourth Amendment protections pursuant to this Court's precedent concerning administrative search exceptions for commercial enterprises. *New York v. Burger, supra; Marshall v. Barlow's, Inc.*, 436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978). Concluding that police officers work in such a "highly regulated industry" that their expectations of privacy when performing intimate bodily function are diminished to the point of non-existence, the Court of Appeals determined that warrantless searches of police officers, even where no individualized suspicion of wrongdoing exists, is constitutionally acceptable.

The court erroneously justifies its result through reliance upon the fact that police work is subject to a variety of governmental and regulatory rules and procedures. The Court of Appeals notes that regulation, among other things, of hours of employment of police officers, their salaries, their attendance at mandatory training programs, their obligation to perform their duties effectively, and regulation of their manner of dress on duty indicate that police work is so "highly regulated" that Fourth Amendment protections against unreasonable searches and seizures effectively do not apply (101a-115a). The court simply concluded that "the police industry is probably the most highly regulated, with respect to performance of its employees, of any industry in New Jersey" (115a), and that solely and exclusively because of this purported regulatory saturation, constitutional protections against unreasonable searches and seizures are unavailable to municipal police officers in Washington Township. In short, the Court of Appeals effectively presumes that the decision to chose law enforcement as a career, with consequent governmental regulation of that employment, warrants the conclusion that police officers have forfeited any expectation of privacy.

The profound errors committed by the Court of Appeals in

this analysis, and the ominous impact that this will have not only on police officers but any regulated profession, should be obvious. First of all, a number of regulatory provisions governing police work cited by the court below apply to virtually all employees, whether public or private. It is common, indeed traditional, for hours of work, minimum qualifications for employment, residency requirements, manner of dress, on-the-job conduct, prohibited private conduct, or other regulatory controls to be superimposed upon public employment in many industries — which never before were denominated as "highly regulated". Concededly, there are aspects of control by government of police officers which differ from regulations imposed upon other workers. Those controls, however, are matters of degree, not kind. Notwithstanding this fact, and based simply upon the regulatory scheme, the Court of Appeals concluded that submission to the regulatory scheme is a *sub silentio* abdication of constitutional rights. Precedent of this Court and the realities of public employment, however, just do not support the Court of Appeals' conclusion.

While police officers concededly work in a controlled environment, it is simply inappropriate to contend that their service in a regulated industry is the equivalent of the knowing, voluntary or necessary relinquishment of traditional expectations of privacy. Police officers, while legitimately subject to governmental control, neither historically nor in this case have ever been led to believe that their service in a law enforcement capacity concomitantly precludes all expectations of privacy. Prior to this case, police officers certainly had no reason to assume that their mere status of employment would result in complete inapplicability of traditional constitutional principles under the Fourth Amendment. Certainly, as a matter of constitutional history, this Court has never authorized relinquishment of constitutional rights simply because of the employee's status as a police officer. While there may be diminished expectations of privacy by virtue of governmental employment, this case effectively constitutes

wholesale abolition of those expectations. Never before has this Court sanctioned outright exclusion of governmental employees from the ambit of traditional constitutional principles.

For example, the Fifth Amendment right against self-incrimination has been applied to law enforcement officials. *See Garrity v. New Jersey,* 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1987); ("policemen . . . are not relegated to a watered-down version of constitutional rights . . . " *id.* at 616). Similarly, police officers have the right to speak out on matters of public concern under the First Amendment, notwithstanding a presumed interest of their employers in precluding dissent within the ranks. *Connick v. Myers,* 461 U.S. 138, 183 S.Ct. 1684, 75 L. Ed. 2d 708 (1983). At the very least, a careful balancing test is required, weighing the need for governmental action against expected privacy interests before any constitutional right, including Fourth Amendment protections, is infringed. The Court of Appeals' decision, however, completely ignores any balancing of interests. A police officer, simply by virtue of his status in law enforcement, is now effectively outside the ambit of this Court's historic protections against unreasonable searches and seizures.

This abdication of analysis, and consequent failure to adhere to this Court's recent pronouncements on Fourth Amendment jurisprudence, is the root cause of the problem in this case. *O'Connor v. Ortega,* 94 L. Ed. 2d at 728, sets out the proper test, and best explains the deficiency in the Court of Appeals' decision:

> Public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. *Under this reasonableness standard,*

> *both the inception and the scope of the intrusion must be reasonable.* (Emphasis supplied.)

Interestingly, virtually every court which has considered the "administrative search" exception contemplated by the highly regulated industry test has rejected the theory of *Shoemaker* and the reasoning of the court below. *See Lovelorn v. City of Chatanooga,* 846 F.2d 1539 (6th Cir. 1988); *Capua v. City of Plainfield,* 843 F. Supp. 1507 (D. N.J. 1986); *Penny v. Kennedy,* 846 F.2d 1564 (6th Cir. 1988); *See also, Fraternal Order of Police v. Newark,* 524 A.2d 430 (N.J. App. Div. 1987). These courts, as have most courts throughout the United States, instead follow this Court's analysis as enunciated in *O'Connor v. Ortega, supra.* Acknowledging the initial need for proof that a search is "justified in its inception", these courts recognized that the complete absence of a claim, let alone proof, of a drug problem is a sufficient indication that the least, rather than most, intrusive means for ferreting out illegal activities should be implemented. The court below, however, turning this Court's analysis on its head, concludes that the complete absence of a problem, or at least any articulable suspicion of it, nonetheless justifies the wholesale invasion of rights of all individuals, the innocent as well as the presumed guilty. Neither *O'Connor,* nor any other decisions of this Court, warrant the conclusion of the Court of Appeals.

Police officers recognize that their activities and conduct may be more regulated than less vital forms of governmental employment. Yet the Court of Appeals' analysis discards the baby with the bath water. Other means certainly exist for discovering illegal behavior by police without subjecting the wholly innocent to the same invasions of privacy as the purportedly guilty. Surely, some initial showing of a significant drug abuse problem in the Police Department should be required before wholesale abolition of protections against unreasonable searches and seizures is authorized by this Court. Some effort must be made to calibrate

the chosen means of remedy with the scope of the problem. In this case, however, there is no documented (or alleged) drug problem; rather, there exists only an undifferentiated fear that some problem might arise in the future. Similarly, there is no articulable suspicion of drug use by any particular officer which would provide a "reasonable" ground for a search without a warrant. If the court's "administrative search" analysis is an acceptable explanation for relaxing constitutional requirements, however, there no longer exists any reason to even pay lip service to constitutional principles.

Moreover, even assuming, *arguendo,* that police work constitutes a "highly regulated industry", the precedent of this Court upon which the Court of Appeals purportedly relies simply will not support this effort for intrusive searches of persons, rather than places. *New York v. Burger, supra; Marshall v. Barlow's, Inc., supra.* In virtually all of this Court's prior decisions in this area, commercial enterprises and places, historically subject to governmental inspection, were the issue in the Court's analysis. Here, in contrast, the Court of Appeals has moved into remarkably virgin territory, authorizing demeaning searches of intimate bodily functions of the individual, rather than mere inspections of the premises of business enterprises. *See, e.g., Camara v. Municipal Court,* ("the inspections are neither personal in nature nor aimed at the discovery of a crime. They involve a relatively limited invasion of the urban citizen's privacy" *id.* at 538). In contrast, random searches of the bodily wastes of governmental employees to search for improprieties, without any articulable evidence of wrongdoing, virtually eliminates any remaining protections which the Fourth Amendment previously provided.

Indeed, the most alarming aspect of this decision is that the seeds for a quickened and inexorable elimination of basic constitutional principles will be firmly planted by this case. While the Fourth Amendment has historically been deemed to require

a warrant, that has long been dispensed with as an automatic prerequisite in evaluating the propriety of a search. *O'Connor v. Ortega, supra.* In its stead, this Court has recognized that the Fourth Amendment's touchstone is "reasonableness," and that careful adherence to this goal may sometimes serve as a substitute for the warrant requirement. *T.L.O. v. New Jersey, supra.* Yet even the indicia of "reasonableness", a traditional prerequisite in any "search" of a person by the government, now apparently appears ready to be discarded. Indeed, there can be no doubt that virtually all protections guaranteed by the Fourth Amendment will be gone if the reasoning of the court below is accepted. Neither a warrant, review of facts by a neutral magistrate, probable cause, reasonable suspicion, or any other objective or individualized requirements which might justify piercing an expected zone of privacy need be proffered. Instead, talismanic invocation of "highly regulated industry" will be sufficient to overcome restraints upon governmental searches. Persons and their property will be subject to intrusive conduct previously prohibited. Once this constitutional analysis of the government's right to search is affirmed, the concept of "reasonableness" which gives the Fourth Amendment vitality will be eroded beyond recognition.

Indeed, the extension of the reasoning of the court below to many, if not most, forms of employment in both the private and public sector should be apparent. Regulated professions such as judges, physicians, lawyers, engineers, architects, pharmacists and a host of others surely could equally be the target of the same theory employed with reference to police. All of these professions are subject to extensive review and control by regulatory agencies, often culminating in the government's ability to preclude totally the practice of the profession. Governmental regulation of many aspects of employment, including codes of conduct, the need for the highest personal and professional standards, and assurances to the public of integrity and probity, while generally expected and often welcomed, has never previously been thought to preempt

enjoyment of traditional Fourth Amendment protections. Yet that is precisely the result which must follow if the reasoning of the court below is accepted.

In short, the decision of the Court of Appeals is an ominous and dangerous departure from previously settled constitutional jurisprudence. It distorts every prior decision of this Court beyond recognition. It misstates or misapplies every one of this Court's limited exceptions to the general rule of warrant and probable cause before governmental searches for illegal activity may be conducted. Indeed, it effectively constitutes an abolition of any protections previously extended by the Fourth Amendment against unreasonable searches. For these reasons, review of the decision of the court below is urgently required.

CONCLUSION

For all of the foregoing reasons, *amicus* New Jersey State PBA respectfully requests that the requested petition for certiorari should be granted.

Respectfully submitted,

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